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Matter of Discretion: The De Facto Abolition of the Mandatory Death Penalty in Barbados – A Study of the Boyce and Joseph Cases

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**A Matter of Discretion:
The De Facto Abolition of the Mandatory
Death Penalty in Barbados – A Study
of the Boyce and Joseph Cases**

Jane E. Cross¹

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INTRODUCTION

In the last twenty years, the mandatory death penalty (“MDP”) in the Commonwealth Caribbean² has evolved due to recurrent scrutiny at the national and regional levels. While undoubtedly the judicial erosion of the MDP marks an impressive human rights trend in the region, the trajectory of this change has been complex and frequently discussed.³ The proceedings of The

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2. Joanna Harrington, *The Challenge to the Mandatory Death Penalty in the Commonwealth Caribbean*, 98 AM. J. INT’L L. 126, 126 n.2 (2004), explained that: “The term ‘Commonwealth Caribbean’ refers to a regional grouping of independent states that share political and historical links to the United Kingdom through their former colonial status and are currently members of the international organization now known simply as “The Commonwealth.” The group includes Antigua and Barbuda, the Bahamas, Barbados, Dominica, Grenada, Jamaica, St. Kitts (also known as St. Christopher) and Nevis, St. Lucia, St. Vincent and the Grenadines, as well as Guyana and Belize, although these last two states are geographically part of South and Central America, respectively.”

3. See, e.g., David A. C. Simmons, Q.C., *Conflicts of Law and Policy in the Caribbean-Human Rights and the Enforcement of the Death Penalty-Between a Rock and a Hard Place*, 9 J. TRANSNAT’L L. & POL’Y 263, 271 (2000); Harrington, *supra* note 2, at 126; Derrick V. McCoy, *Identifying the Chi in Commonwealth Caribbean Law:*

Attorney General of Barbados versus Jeffrey Joseph (“Joseph”) and Lennox Ricardo Boyce (“Boyce”) afforded an instructive exploration of the judicial evolution of the MDP because they have resulted in a review of four important areas of MDP jurisprudence: (1) the constitutionality of the MDP; (2) the deadlines for appealing the imposition of the MDP; (3) the judicial review of executive proceedings on clemency concerning the MDP; and (4) the ability to petition international bodies for relief from the MDP. The decisions of the Judicial Committee of the Privy Council (“JCPC”) and the Caribbean Court of Justice (“CCJ”) in the Joseph and Boyce Cases have illustrated the domestic and international human rights implications of the MDP.⁴ In particular, the decision of the CCJ in the Joseph and Boyce matters (the “CCJ Joseph-Boyce Case”) seeks to restore stability to judicial procedural mandates while establishing a means to achieve judicial scrutiny of executive prerogative to either enforce or set aside the MDP. What evolves from the CCJ’s restoration of this balance is the creation of a judicial review mechanism that allows scrutiny of the imposition of the death penalty and the preservation of access to international forums.

In this manner, a review of the Boyce and Joseph Cases provides a comprehensive review, particularly for those who are unfamiliar with the history of MDP, into the maturation of the jurisprudence surrounding the MDP in the Commonwealth Caribbean. Over a span of eight years, the appellant-defendants, Boyce and Joseph, initiated appeals and petitions that resulted in judgments from the JCPC,⁵ the CCJ⁶ and the Inter-American Court of Human Rights (the “Inter-American Court”).⁷ The Boyce-Joseph Cases illuminate the intricate evolution of Commonwealth Caribbean jurisprudence arising out of the need to reconcile the MDP with evolving legal norms.⁸ The first set of appeals of this case in

The Contribution of the Common Law and Human Rights Law to Constitutional Interpretation, 2-6 (Oct. 18, 2007), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1021627.

4. Att’y Gen. v. Joseph, [2005] C.C.J. 2 (AJ) (Barb.) (de la Bastide, J. & Saunders, J.) (hereinafter “Joseph”).

5. Boyce and Joseph v. The Queen, [2004] UKPC 32 (hereinafter “Boyce and Joseph”).

6. Joseph, *supra* note 4, at 1.

7. Boyce et al. v. Barbados Case, 2007 Inter-Am. Ct. H.R. (ser. C) No. 169, (Nov. 20, 2007) (hereinafter “Boyce et al.”).

8. Dennis Morrison, *The Judicial Committee of the Privy Council and the Death Penalty in the Commonwealth Caribbean: Studies in Judicial Activism*, 30 NOVA L. REV. 403, 411-23 (2006) (identifying the following areas of judicial activism by the JCPC: (1) The impact of delay in carrying out a death sentence; (2) the determination

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Barbados led to a decision by the JCPC⁹ and a petition before the Inter-American Commission on Human Rights (“Commission”)¹⁰ that later resulted in a judgment by the Inter-American Court.¹¹ At about the same time that the Commission’s petition was submitted to the Inter-American Court, a second set of appeals involving procedural issues in the case were being presented to the newly inaugurated CCJ¹². As a second stage in the appeals process, the Boyce and Joseph Cases afforded the CCJ with the opportunity to re-examine the constitutional and procedural issues underlying the MDP and the interaction of these issues with international treaty obligations. Moreover, the CCJ judgment sought to resolve ongoing tensions between international obligations and domestic law in a manner that re-asserted respect for domestic sovereignty as a cornerstone of post-independence Caribbean jurisprudence while enabling responsiveness to changing applications of international human rights norms.¹³

As such, the CCJ Joseph-Boyce Case provides an extensive overview of the MDP in the Commonwealth Caribbean and accordingly affords both an understanding of legal history in the region and provides insight into the forces and causes that continue to shape the region’s emerging jurisprudence.¹⁴ Due to its historical entrenchment, the law dealing with the MDP has engendered significant evolutionary cornerstones in the Commonwealth Caribbean jurisprudence. Thus, the CCJ, through its exploration of these evolving legal norms, has worked to reconcile the constitutional idiosyncrasies and treaty obligations that have framed MDP issues in the Commonwealth Caribbean.

of procedural fairness in the exercise of the prerogative of mercy; and (3) the constitutionality of the mandatory death penalty).

9. See *Boyce and Joseph*, *supra* note 5.

10. See *Boyce v. Barbados*, Case 12.480, Inter-Am. Comm’n H.R. (2006).

11. *Boyce et al.*, *supra* note 7, at 8.

12. *Joseph*, *supra* note 4, at ¶ 1.

13. The lengthy procedural path of these cases and the resulting exploration of death penalty jurisprudence provides insights into: (1) the historical and constitutional nuances of the Commonwealth Caribbean Legal System; (2) the reasons that Caribbean nations seek to replace the Judicial Committee of the Privy Council with the Caribbean Court of Justice; and (3) human rights evolution that resulted from the reconciling the mandatory death sentence with changing legal norms. An excellent resource for the discussion of the historical roots of the Commonwealth Caribbean Legal System can be found in Rose-Marie Belle Antoine, *Commonwealth Caribbean Law and Legal Systems* (2008).

14. For a discussion of the development and use of the term “Commonwealth Caribbean Jurisprudence,” see McCoy, *supra* note 3, at 2-6.

PROCEDURAL HISTORY AND FACTUAL BACKGROUND OF THE
BOYCE-JOSEPH CASES:

An understanding of the legal importance of CCJ Joseph-Boyce Case requires an overview of the background and procedural history of the proceedings in this matter. Following the conviction of Boyce and Joseph in February 2001, the first series of appeals ended in 2004 with the JCPC sitting in London as the final court of appeal.¹⁵ The second set of appeals ended with a decision by CCJ established in April 2005 in Port of Spain, Trinidad.¹⁶ As this second group of appeals was being completed, Boyce and Joseph also petitioned the Inter-American Commission on Human Rights in 2004 and received a judgment from the Inter-American Court of Human Rights in 2007. The factual background underlying this complex procedural history is also quite compelling.

The Joseph-Boyce Case began with an unfortunate altercation between two young men. On April 10, 1999, Marquelle Hippolyte (“Hippolyte”) had a disagreement on a bus with Rodney Murray (“Murray”). After Hippolyte left the bus, Murray was hit by a rock thrown by Hippolyte or one of his friends. Later that day, Hippolyte was pursued after being spotted on a basketball court and was brutally beaten with rocks and wood planks in a planned retaliation. The attackers were Murray, Romain Bend (“Bend”), Jeffrey Joseph (“Joseph”), and Lennox Ricardo Boyce (“Boyce”). Despite extensive medical treatment, Hippolyte later died on April 15, 1999, from a brain hemorrhage and shock.¹⁷ On January 10, 2001, Murray and Bend plead guilty to manslaughter and were sentenced on February 27, 2001, to twelve years in prison.¹⁸ On January 24, 2001, Joseph and Boyce plead not guilty to murder.¹⁹ On February 2, 2001, Joseph and Boyce were found guilty of murder and were sentenced to the mandatory death sentence by hanging, in accordance with section 2 of Barbados’ Offences Against the Person Act of 1994.²⁰

15. Simmons, *supra* note 3, at 265.

16. *Barbados Rediffusion v. Mirchandani*, [2006] C.C.J. 1 (AJ) (explaining how the CCJ replaced the JCPC as the final court of appeals in Barbados).

17. *Boyce et al.*, *supra* note 7, at 13 n.34; Final Written Submissions of the Alleged Victims, *Boyce et al. v. Barbados Case*, 2007 Inter-Am. Ct. H.R. (ser. C) No. 169, at 14 (Aug. 13 2007); *Bend and Murray v. the Queen* (Criminal Appeals Nos. 19 and 20 of 2001, unreported decision of 27 March 2002) 1, <http://www.lawcourts.gov.bb/LawLibrary/events.asp?id=283> (hereinafter “*Bend and Murray*”).

18. *Bend and Murray*, *supra* note 17.

19. Final Written Submissions of the Alleged Victims, *Boyce et al. v. Barbados Case*, 2007 Inter-Am. Ct. H.R. (ser. C) No. 169, at 14 (Aug. 13 2007).

20. *Joseph*, *supra* note 4, at ¶ 1. According to the Final Submissions of the Alleged

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On March 27, 2002, the Joseph and Boyce appeal to the Court of Appeal of Barbados was dismissed.²¹ After this dismissal, Joseph and Boyce communicated with the Governor-General of Barbados about their intention to appeal their death sentences to the JCPC.²²

Nonetheless, the Barbados Privy Council (“BPC”)²³ met on June 24, 2002, and advised against commutation of the death sentences. As a result, death warrants were read to Boyce and Joseph for the first time on June 26, 2002. Following that, an order was obtained from the High Court of Barbados staying the execution on June 28, 2002, for a period of twenty-eight days pending an appeal to the JCPC.²⁴ On July 7, 2004, the JCPC upheld (by a five-to-four majority) the constitutionality of the MDP in Barbados, and dismissed the appeals of Joseph and Boyce.²⁵

On July 9, 2004, the counsel for Boyce and Joseph gave notice of their intention to file an application before the Commission.²⁶

Victims, “the Crown had indicated prior to trial that pleas of manslaughter would also be acceptable from Boyce and Joseph, but they maintained their innocence and elected to stand trial.” Final Written Submissions of the Alleged Victims, *Boyce et al. v. Barbados Case*, 2007 Inter-Am. Ct. H.R. (ser. C) No. 169, at 14 (Aug. 13 2007). Justice Wit noted in his opinion that “The other two, the respondents, opted to be tried on a charge of murder on the basis of a not guilty plea. They were convicted for murder and subsequently and automatically sentenced to death. There are no facts to suggest that the involvement of the respondents in the crime was more serious than that of the other two. Joseph did have a criminal record, but an unimpressive one. Boyce had no criminal record whatsoever. Reports by the prison authorities on their behavior were in neither case unfavorable. The only relevant difference between the respondents and their fellow accused seems to be that the latter spared the Crown the time and costs of a trial.” *Joseph*, *supra* note 4, at ¶ 4 (Wit, J., concurring). See also *Offences Against The Person Act*, 1994, 5 L.R.O. 1995, ch. 141, § 2 (Barb.).

21. *Bend and Murray*, *supra* note 17.

22. According to Justice Nelson, “On April 5, 2002 Joseph served the Barbados Privy Council (“BPC”) with notice of his petition to the Privy Council for special leave to appeal in forma pauperis.” As explained by President Micheal de la Bastide and Justice Adrian Saunders of the Caribbean Court of Justice, “[c]ounsel [for Joseph and Boyce] were repeatedly invited to make written submissions to the [BPC] but they chose not to do so. Counsel’s position was that unless a commutation of the sentence was being recommended, it was inappropriate for the BPC to meet given that the men intended, and were actively preparing, to prosecute an appeal to the JCPC.” *Joseph*, *supra* note 4, at ¶ 3 (Nelson, J.).

23. The function of the Barbados Privy Council is explained *infra* note 47.

24. *Joseph*, *supra* note 4, at ¶ 4.

25. This case, *Boyce v. The Queen*, [2004] UKPC 32, is discussed *infra* note 61. As noted below, this case is one of three mandatory death penalty cases decided on the same day by the JCPC.

26. Final Written Submissions of the Alleged Victims, *Boyce et al. v. Barbados Case*, 2007 Inter-Am. Ct. H.R. (ser. C) No. 169, at 30 (Aug. 13 2007).

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That application was filed on September 3, 2004, to obtain a declaration that Boyce and Joseph suffered a violation of their rights under the American Convention on Human Rights (“Convention”).²⁷ Even though the BPC was informed of this filing on September 4, 2002, the BPC met on September 13, 2004, to consider ramifications of the JCPC decision and advised “the Governor-General that the death sentences should be carried out.”²⁸ Two days after that meeting, on September 15, 2004, death warrants were read to Boyce and Joseph again for an execution scheduled on September 21, 2004.²⁹

The scheduled execution was once again stayed pending a motion made on September 16, 2004, before the High Court of Barbados to seek, among other things, a commutation of death sentences.³⁰ Similarly, on September 17, 2004, the Commission accepted a petition submitted on behalf of Boyce and Joseph and also applied to the Inter-American Court for the issuance of provisional measures regarding Barbados.³¹ On that same day, the President of the Inter-American Court issued an order for provisional measures “[t]o require the State to adopt, without delay, all of the necessary measures to preserve the life and physical integrity of Lennox Boyce and Jeffrey Joseph, so as not to hinder the

27. *Joseph, supra* note 4, at ¶ 5; Final Written Submissions of the Alleged Victims, Boyce et al. v. Barbados Case, 2007 Inter-Am. Ct. H.R. (ser. C) No. 169 at 30 (Nov. 20, 2007). See also Emilio Álvarez Icaza, Exec. Sec’y of the Inter-American Commission on Human Rights, *The Inter-American System and Challenges for Its Future*, Fifteenth Annual Grotius Lecture (April 3, 2014) (transcript published by American Society of International Law) (“A majority of the member states of the Organization of American States abolished capital punishment, but a substantial minority retain it. The Commission, at its motion, and the Court, have dealt with the practice of the obligatory imposition of the death penalty upon conviction for murder in a number of countries in the Caribbean and have concluded that its automatic imposition, without considering the individual circumstances of the offense or the offender, is incompatible with the rights to life, humane treatment, and due process. The standards developed as a result, and the interaction between the inter-American human rights bodies and the judicial bodies of the Commonwealth Caribbean, have given rise to unprecedented changes in law and policy. At present, only two of those countries retain the mandatory death penalty, and one of those is in the process of reforming it in compliance with decisions of the organs of the Inter-American System.”).

28. *Joseph, supra* note 4, at ¶5; Final Written Submissions of the Alleged Victims, Boyce et al. v. Barbados Case, 2007 Inter-Am. Ct. H.R. (ser. C) No. 169, at 30 (Aug. 13, 2007).

29. *Id.*

30. *Id.* ¶ 6.

31. *Boyce et al., supra* note 7, at 8.

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processing of their cases before the Inter-American system.”³² The Inter-American Court ratified the President’s Provisional Order on November 25, 2004, nearly a month before the Barbados High Court had ruled on the motions previously made by Boyce and Joseph.³³

On December 22, 2004, the Barbados High Court dismissed the two motions that accompanied the stays of execution granted in June and September 2004, and issued a six-week extension of the stay of execution, pending the filing of another appeal with the Barbados Court of Appeal.³⁴ After the filing of that appeal, the Court of Appeals extended the stay of execution for Boyce and Joseph until the appeal’s conclusion.³⁵ On May 31, 2005, the Barbados Court of Appeals ordered the death sentences commuted and substituted for a sentence of life imprisonment.³⁶

On June 20-21, 2006, the Attorney General’s appeal of the Barbados Court of Appeals decision was heard before the newly inaugurated Caribbean Court of Justice, which replaced the JCPC as Barbados’ final court of appeal.³⁷ Two days later on June 23, 2006, the Commission submitted to the Inter-American Court an application against the State of Barbados based on the petition submitted on September 3, 2004.³⁸ On November 8, 2006, the Caribbean Court of Justice delivered its opinion, which ultimately dismissed the appeal of the commutation of the death sentences.³⁹ Just over a year later, on November 20, 2007, the Inter-American Court issued its judgment finding that Barbados violated the rights of Boyce and Joseph under the American Convention on Human Rights.⁴⁰

Mandatory Death Penalty as a Colonial Institution

The extensive procedural history surrounding the Boyce and Joseph cases epitomize the human rights tension resulting from

32. *Id.* at Provisional Measures, Resolution of the Inter-American Court of Human Rights of November 25, 2004, fourth “Considering.”

33. *Id.* at 8.

34. *Joseph, supra* note 4, at ¶ 10 (Nelson, J.).

35. *Id.*

36. *Boyce et al., supra* note 7, at 5 n.13 (citing Jeffrey Joseph and Lennox Ricardo Boyce v. The AG et al., Civil Appeal No. 29 of 2004 (May 31, 2005)).

37. On April 16, 2005, the Caribbean Court of Justice was inaugurated. See [Caribbean Court of Justice](http://www.caribbeancourtofjustice.org); The CCJ from Concept to Reality <http://www.caribbeancourtofjustice.org/about-the-ccj/ccj-concept-to-reality> (last visited May 29, 2012).

38. See *Boyce et al., supra* note 7, at 1.

39. See *Joseph, supra* note 4.

40. See *Boyce et al., supra* note 7.

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the preservation of a colonial criminal penalty. At independence, Commonwealth Caribbean nations preserved the mandated penalty for the crime of murder, which is death by hanging.⁴¹ Accordingly, the MDP for murder was preserved by including “existing law” or “savings law” clauses in the Commonwealth Caribbean Constitutions.⁴² Without those clauses, imposing a sentence of death without considering mitigating circumstances at trial could be found to be “inhuman or degrading punishment” in contravention of the fundamental rights and freedoms provisions expressed in their constitutions adopted at independence.⁴³

By Constitution, mitigating circumstances in mandatory death sentence cases are considered post-trial.⁴⁴ As the representative of Her Majesty the Queen, the Governor-General⁴⁵ makes the decision on whether (1) to carry out the sentence of death, or

41. See *Boyce and Joseph*, *supra* note 5; see also David A. C. Simmons, Q.C., *Conflicts of Law and Policy in the Caribbean-Human Rights and the Enforcement of the Death Penalty-Between a Rock and a Hard Place*, 9 J. TRANSNAT'L L. & POL'Y 263, 265 (2000) (“In the same way the right to life is statute-based, so too is the death penalty. Section 2 of the Offences Against The Person Act provides that ‘[a]ny person convicted of murder shall be sentenced to, and suffer, death.’ This provision predated Independence and a written Constitution that came into force on November 30, 1966. The Constitution of Barbados itself contemplates the death penalty. Section 12(1) states: ‘No person shall be deprived of his life intentionally save in execution of the sentence of a court in respect of a criminal offence under the law of Barbados of which he has been convicted.’”).

42. See *Boyce and Joseph*, *supra* note 5, at ¶ 30; see also Saul Lehrfreund, *International Legal Trends and the ‘Mandatory’ Death Penalty in the Commonwealth Caribbean*, 1 OXFORD U. COMMW. L.J. 171, 171 (2001) (“Savings clauses operate in all jurisdictions of the Commonwealth Caribbean, except Belize, to preserve the colonial status quo from constitutional challenge. Either they rule out altogether any constitutional attack on the laws in existence at the time of independence, or they at least prohibit any attack on the specific colonial penalties or punishments in existence at the time of independence based on the alleged cruelty or inhumanity of those punishments.”).

43. See *Boyce and Joseph*, *supra* note 5, at ¶ 74; see also Simmons, *supra* note 3, at 264-65 (2000) (“The right to life is guaranteed in Section 11 of Chapter III of the Constitution of Barbados, which is devoted to provisions for the protection of fundamental rights and freedoms of the individual. This right to life is, however, subject to limitations. Section 11 specifically provides that the limitations are ‘designed to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest.’ In other words, the right to life must yield to a competing public interest in certain circumstances. Chapter III was greatly influenced by the European Convention for the Protection of Human Rights and Fundamental Freedoms (1953). That Convention was in turn influenced by the United Nations Universal Declaration of Human Rights of 1948 (citations omitted).”)

44. BARB. CONST. § 78 (3).

45. *Id.* § 78 (1); “Even after independence, the Governor-General is appointed by and serves at the pleasure of Her Majesty, the Queen of England, and is Her Majesty’s representative in Barbados.” *Id.* at § 28.

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(2) to exercise the prerogative of mercy to (a) grant clemency, or (b) commute the death sentence to life imprisonment.⁴⁶ In making that decision, the Governor-General is advised by a non-judicial appointed body known as the Privy Council.⁴⁷ Moreover, an “ouster clause” in the Barbados Constitution purportedly shielded Privy Council decisions from judicial review.⁴⁸ These inherited colonial laws and institutions that preserve the MDP in the Commonwealth Caribbean began to garner the attention of the international human rights community, and as a result, these governments felt pressured to conform to international human rights obligations in domestic proceedings. Thus, the Joseph and Boyce cases show the contours of the judicial erosion of the colonial jurisprudential relics of MDP in the Commonwealth Caribbean and the invocation of more innovative jurisprudential trends.⁴⁹ Accordingly, the Joseph and Boyce cases have reviewed and highlighted many of the constitutional and procedural landmarks that now define an emergent interdependent nexus in Commonwealth Caribbean human rights and jurisprudence.

USING THE JOSEPH AND BOYCE CASES TO EXAMINE THE
VAGARY OF JUDICIAL COMMITTEE OF PRIVY COUNCIL
DECISIONS ON THE CONSTITUTIONALITY
OF THE MANDATORY DEATH PENALTY

The first set of appeals of the Joseph and Boyce matter were one of a two-part series of appeals challenging the constitutionality of the MDP in the JCPC. In two trios of landmark cases in 2002 and 2004, the JCPC examined the constitutionality of the MDP. In the 2002 cases, the JCPC observed that the MDP laws in

46. See *Boyce and Joseph*, *supra* note 5, at ¶¶ 21, 23.

47. See *id.* ¶ 21; the members of the Privy Council in Barbados are appointed by the Governor-General in consultation with the Prime Minister. BARB. CONST. § 76 (3c). Due to its functions, the Privy Council is also known as the Barbados Mercy Committee or the Barbados Prerogative of Mercy Committee.

48. BARB. CONST. § 77 (4) (stating “[t]he question whether the Privy Council has validly performed any function vested in it by this Constitution shall not be inquired into any court”).

49. See Harrington, *supra* note 2, at 130 (noting that “[t]he mandatory death penalty is a colonial legacy. Under the common law of England, death was the only sentence that could be pronounced by judge upon a defendant who was convicted of murder, regardless of the nature of the offense or the particular circumstances of the offender. Through colonialism, this simple and undiscriminating rule was applied to many of Britain’s colonies, and upon independence, the nations of the Commonwealth Caribbean preserved the rule that was in place as part of their colonial inheritance.” (citations omitted)).

the Commonwealth Caribbean countries ran afoul of the human rights principles embodied in their constitutions at independence.⁵⁰ To make that determination, the JCPC examined whether the “pre-existing laws” provisions or “savings clause” in the respective Commonwealth Caribbean Constitutions adequately shielded their MDP laws from constitutional scrutiny.⁵¹ In three cases in 2002 and a fourth in 2003, the JCPC opined that MDP sentences were unconstitutional in four Commonwealth Caribbean nations. In *Reyes v. The Queen*, the Board stated that “[t]o deny the offender the opportunity, before sentence is passed, to seek to persuade the court that in all the circumstances to condemn him to death would be disproportionate and inappropriate is to treat him as no human being should be treated and thus to deny his basic humanity. . .”⁵² Along these lines, the JCPC upheld the death penalty, but not as a mandatory sentence. The result of those ruling was summarized in the dissenting opinion for *Matthew v. The State*,⁵³ a companion case to *Boyce and Joseph v. The Queen* as follows:

In *Reyes v. The Queen* [2002] 2 AC 235, *R v. Hughes* [2002] UKPC 12, [2002] 2 AC 259 and *Fox v The Queen* [2002] UKPC 13, [2002] 2 AC 284 modifications were made to the laws of Belize, St Lucia and St Christopher and Nevis respectively which did not outlaw the death penalty but substituted a discretion to impose sentence of death in appropriate cases for a mandatory duty to impose it. A similar course was followed, in our view rightly, by a majority of the Board in *Roodal v. State of Trinidad and Tobago* [2003] UKPC 78, [2004] 2 WLR 652.⁵⁴

Decided less than a year after *Roodal*, *Boyce and Joseph v. The Queen*⁵⁵ indicated an odd reversal of the JCPC’s trend in striking down the MDP. In *Boyce and Joseph*, Lord Hoffman, writing for the majority, noted that, “the effect of the *Roodal* decision was to lay open the whole of the pre-independence law of Barbados to challenge. . .”⁵⁶ Re-examining its decision in *Roodal*, the majority

50. See *Reyes v. The Queen*, [2002] UKPC 11, ¶ 1 [2002] 2 A.C. 235 (appeal taken from Belize).

51. See Morrison, *supra* note 8, at 419-23.

52. *Reyes*, [2002] UKPC 11 at ¶ 43.

53. *Matthew v. The State*, [2004] UKPC 33, [2005] 1 A.C. 433 (appeal taken from Trin. & Tobago).

54. See *Boyce and Joseph*, *supra* note 5, at ¶ 53.

55. *Roodal, Boyce and Joseph v. The Queen*, [2004] UKPC 32, [2005] 1 A.C. 400 (appeal taken from Barb.)

56. *Id.* ¶ 62.

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in *Boyce and Joseph* held that the MDP in Barbados was, in fact, enforceable due to the existing law provision in the Barbados Constitution.⁵⁷ The “saving of existing law” provision in section 26 of the Barbados Constitution protects written laws enacted prior to independence even when those laws are modified.⁵⁸ The majority explained that the MDP was written into section 2 of the Barbados Offences Against the Person Act 1868, which reads in part, “whosoever shall be convicted of murder shall suffer death as a felon.”⁵⁹ After independence in 1966, the Offences Against the Person Act 1994 replaced the 1868 act.⁶⁰ Thus, the MDP in the 1994 act was protected as existing law even though the Board found that it was not consistent with the constitutional prohibition against inhuman and degrading punishment.⁶¹ The majority also noted that “the mandatory death penalty is inconsistent with the international obligations of Barbados” but that those obligations do not “have any direct effect upon the domestic law of Barbados.”⁶² Accordingly, the majority recognized that preserving the MDP was contrary to evolving international norms.

57. *Id.* ¶ 6.

58. The saving of existing law provision in section 26 of the Barbados Constitution reads:

“1. Nothing contained in or done under the authority of any written law shall be held to be inconsistent with or in contravention of any provision of sections 12 to 23 to the extent that the law in question -

- a. is a law (in this section referred to as ‘an existing law’) that was enacted or made before 30th November 1966 and has continued to be part of the law of Barbados at all times since that day;

- b. repeals and re-enacts an existing law without alteration; or
- c. alters an existing law and does not thereby render that law inconsistent with any provision of sections 12 to 23 in a manner in which, or to an extent to which, it was not previously so inconsistent.

2. In subsection (1)(c) the reference to altering and existing law includes references to repealing it and re-enacting it with modifications or making different provisions in lieu thereof, and to modifying it; and in subsection (1) ‘written law’ includes any instrument having the force of law and in this subsection and subsection (1) references to the repeal and re-enactment of an existing law shall be construed accordingly.”

59. Relevant language from the 1868 statute reads “whosoever shall be convicted of murder shall suffer death as a felon.” *Id.* ¶ 8 (quoting Section 2 of the Barbados Offences Against the Person Act 1868).

60. Offences Against the Person Act, 1994, §2 (Barb.) (The relevant language now reads: “[a]ny person convicted of murder shall be sentenced to, and suffer, death.”).

61. *Boyce v. The Queen*, [2004] UKPC 32 ¶ 6, [2005] 1 A.C. 400 (appeal taken from Barb.) (referencing the BARB. CONST. § 15(1)).

62. *Id.* ¶ 25.

With respect to the majority's interpretation of the existing law provision and the preservation of the mandatory death sentence, the dissenting Lordships stated:

This is no doubt a possible reading of these provisions. But it is not the only possible reading. Nor, in our opinion, is it the preferable reading. It puts a narrow and over-literal construction on the words used, gives little or no weight to the principles which should guide the approach to interpretation of constitutional provisions, gives little or no weight to the human rights guarantees which the people of Barbados intended to embed in their Constitution and puts Barbados in flagrant breach of its international obligations.⁶³

To remedy those transgressions, the dissenting Lordships explained that "we would modify section 2 of the Offences Against the Person Act 1994 by substituting 'may' for 'shall.'"⁶⁴

The majority and dissenting opinion in *Matthew* divided along the same lines as the *Boyce and Joseph* case. Lord Hoffman writing for the majority explained:

In its judgment delivered today in *Boyce and Joseph v. The Queen* the Board has rejected the reasoning in *Roodal* and decided that the law imposing a mandatory death penalty for murder in Barbados remains valid. Their Lordships do not propose to repeat all that was said in their judgment in that case, to which reference should be made. They will confine themselves to setting out the relevant legislation in Trinidad and Tobago and explaining why the reasoning in *Boyce and Joseph v. The Queen* also leads to the conclusion that the law imposing the mandatory death penalty for murder in Trinidad and Tobago remains valid.⁶⁵

Thus, the majority in *Matthew* plainly stated that this 2004 decision expressly overruled its 2003 decision in *Roodal*, consequently reinstating the MDP in Trinidad and Tobago.⁶⁶ On the basis of the majority decisions *Boyce and Joseph* and *Matthew*, it would not have been surprising if the JCPC had also upheld the MDP law in Jamaica. What was perplexing to those who did follow the reasoning in these cases is why the JCPC decided not to uphold MDP in Jamaica.

In *Watson v. The Queen*, the Board acknowledged that it was

63. *Id.* ¶ 78.

64. *Id.* ¶ 82.

65. *Matthew v. The State*, [2004] UKPC 33 ¶ 10, [2005] 1 A.C. 433.

66. *Id.* ¶ 7.

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making an incongruent decision by stating “[i]t is said that the outcome in this appeal, as compared with the result in those two cases [*Boyce and Joseph* and *Matthew*], is anomalous.”⁶⁷ The JCPC explained that the different result was due to the applicability of the existing law provisions in each case. The JCPC distinguished its holdings by noting that: “[i]n *Matthew* and in *Boyce and Joseph* the laws in question are existing laws. In the present case the law in question is not.”⁶⁸ Unlike the new legislation in Barbados and Trinidad and Tobago, Jamaica amended the Offences Against the Person Act of 1864 with the Offences Against the Person (Amendment) Act 1992. In the 1992 act, the mandatory death sentence was limited to cases of “capital murder” or multiple “non-capital” murders. In examining the new law, the JCPC found that the MDP for repeat non-capital murder was not “existing law” and therefore the MDP set forth in that part of the act was unconstitutional. As a result, the 1992 act would be read to authorize, but not require the death penalty for non-capital murder.

These strange constructions are difficult to explain and understand. On the one hand, the JCPC has upheld MDP even though it is contrary to the provisions of Commonwealth Caribbean constitutions and evolving international norms. On the other hand, the JCPC recognized that the continued application of saving law or existing law clauses has a petrifying effect on the evolution of fundamental rights and has stalled the application of constitutional and international principles to the MDP. Thus, the JCPC’s decisions show the difficulty in applying the existing law clauses in the Commonwealth Caribbean. The questions of what law existed and whether it is preserved after amendment is not simple. In particular, the notion of preserving the validity of colonial, antiquated laws seems to grate against the development of post-independence legal systems. While the JCPC has had some difficulty balancing the conflicting considerations in the Commonwealth Caribbean norms, the CCJ has worked to strike a more comprehensible balance between the constraints of an inherited colonial legal system and progressive notions of fundamental rights.

67. *Watson v. The Queen*, [2004] UKPC 34 ¶ 51, [2005] 1 A.C. 472 (appeal taken from Jam.).

68. *Id.* ¶ 52.

BOYCE-JOSEPH TIMELINE AND JCPC DEADLINES

In addition to questions of constitutionality, the JCPC in *Pratt and Morgan v. The Attorney General*⁶⁹ created a five-year deadline for carrying out the MDP after sentencing. The CCJ noted that Barbados had already conceded the commutation of the death sentence and that the point was therefore not fully argued. By the time the Boyce-Joseph appeal to the CCJ in 2006, “[o]ver five years had elapsed since their conviction and sentence.”⁷⁰ Regardless of that lapse and the fact that Barbados Attorney General “made no attempt to challenge the applicability to them of the time-limit for carrying out the death penalty laid down in *Pratt and Morgan*”⁷¹, the CCJ took the opportunity to review the five-year deadline in the *Pratt* decision in light of the difficulty created by the JCPC decision in *Lewis v. The Attorney General of Jamaica*.⁷² President de la Bastide and Justice Saunders began their review by observing that *Pratt* was “a decision of the JCPC, delivered in 1993, [that] had a seismic effect on capital punishment jurisprudence in the Commonwealth Caribbean.”⁷³ These two Justices then interpreted the five-year limitation established by *Pratt* as follows:

A period of five years following sentence was established as a reasonable, though not by any means inflexible, time-

69. Simmons, *supra* note 3, at 271 (“[t]he immediate result of the decision in *Pratt* was that all Caribbean jurisdictions, which had prisoners on death row in excess of five years, had to commute their sentences to life imprisonment”).

70. *Joseph*, *supra* note 4, at ¶ 15. In addition, the Justices observed that “the time permitted by *Pratt* for their execution has already expired and the commutation of their death sentences is no longer challenged. However, the matter is too important and too contentious to shelve on that basis. It was fully argued in the courts below and before us and the parties are entitled to have our ruling on it.” *Id.* ¶ 50.

71. *Id.* ¶ 15.

72. *Lewis v. Attorney General*, [2001] 2 A.C. 50 (P.C.) (appeal taken from Jam.). In *Lewis*, the JCPC stated that the 18-month period allotted to receive a report from the Inter-American Commission on Human Rights should not increase the five-year period established in *Pratt*, [2001] 2 A.C. 50 (P.C.). Referencing Jamaican cases in a discussion about a Barbadian case is not unusual given that the JCPC applies the reasoning of cases originating from another Commonwealth Caribbean nation when similar constitutional provisions merit such an application. See ROSE-MARIE BELLE ANTOINE, COMMONWEALTH CARIBBEAN LAW AND LEGAL SYSTEMS, 119 (Routledge-Cavendish ed., 2nd ed. 2008) (stating that “[i]n the Commonwealth Caribbean, precedents from other Commonwealth Caribbean jurisdictions and the UK are usually highly persuasive.”).

73. *Joseph*, *supra* note 4, at ¶¶ 45-46. The Justices noted that “[t]he decision caused disruption in national and regional justice systems. Its effect was that, in one fell swoop, all persons on death row for longer than five years were automatically entitled to have, and had, their sentences commuted to life imprisonment. In Jamaica there were 105 such prisoners, in Trinidad & Tobago 53, and in Barbados 9.” *Id.*

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limit within which the entire post-sentence legal process should be completed and the execution carried out. If execution was not carried out within that time-frame, there was a strong likelihood that the court would regard the delay as amounting to inhuman treatment and commute the death sentence to one of life imprisonment.⁷⁴

Within the *Pratt* case, the JCPC had allotted two years for “the entire appellate process” and another eighteen months “for applications to international bodies.”⁷⁵ Despite the initial impact of these time limits, the CCJ opted to uphold the five-year time-limit established in *Pratt* by noting “[w]e respectfully endorse without reservation the proposition that the practice of keeping persons on death row for inordinate periods of time, is unacceptable and infringes constitutional provisions that guarantee humane treatment.”⁷⁶

The two Justices also examined the timing dilemma created by the *Lewis* case. According to the Justices:

the JCPC decided *inter alia*, that, where a State has ratified a treaty conferring on individuals the right to petition an international human rights body, a person sentenced to death by a court of that State is entitled by virtue of his constitutional right to the protection of the law, to require that the sentence of death passed on him be not carried out until his petition to the human rights body has been finally disposed of and the report of that body is available for consideration by the State authority charged with exercising the prerogative of mercy.⁷⁷

Given that the international obligations identified in *Lewis* must also be satisfied within the *Pratt* deadlines, the resulting procedural hurdles were more difficult to clear because the state has “no control over the pace of proceedings before the relevant international human rights body.”⁷⁸

Despite the political fallout and debate sparked by *Pratt* and *Lewis*, ultimately, the CCJ declined to overrule the *Pratt* decision.⁷⁹ Instead, the de la Bastide and Saunders opinion indicated that proceedings protected by *Lewis* could exceed the specified

74. *Id.* ¶ 45.

75. *Id.*

76. *Id.* ¶ 47.

77. *Id.* ¶ 48.

78. *Joseph*, *supra* note 4, at ¶ 48.

79. For a more detailed discussion of the impact of and the rationale for the *Pratt* decision, see *generally* Morrison, *supra* note 8.

eighteen-month period and the overall five-year limit in *Pratt*. Thus, flexibility in the application these deadlines would be permitted if “the additional time taken is not attributable to delays in the process for which the Government concerned is responsible.”⁸⁰

The CCJ also addressed whether the Barbados Court of Appeal was correct in its decision to commute the death sentence in the Joseph-Boyce appeal of the BPC attempt to act prior to a petition to the Inter-American Commission. The Justices agreed that commutation was appropriate because to resort to the Inter-American Court would have “taken the case over the five-year limit set in *Pratt*, as applied in *Lewis*, both of which were at the material time the law of Barbados.”⁸¹ Even if the CCJ had overturned precedent to extend the *Pratt* and *Lewis* timelines, the Justices opined that they could not re-impose the sentence of death. In explaining this decision, the Justices stated that another set of expectations arises when, by application of a court decision, a death sentence is commuted. The “special features of [this] expectation” are as follows,

Firstly, it is the expectation of a person under sentence of death. Secondly, it is an expectation created not by the Executive, but by a court decision which is subsequently reversed. Thirdly, the expectation is that the condemned man will be given a chance (however slim) of avoiding being put to death. To deny the condemned man that chance was deemed so unfair as to render the carrying out of the death sentence cruel and, therefore, unconstitutional.⁸²

Thus, the CCJ opined that Barbados correctly conceded the commutation of the death penalty in accordance with the decision of the Barbados Court of Appeals.⁸³

THE CARIBBEAN COURT OF JUSTICE DECISION ON BOYCE AND JOSEPH

The Barbados Court of Appeals was reviewing the decision of the BPC to take action in the Boyce-Joseph matter before there was an opportunity to petition to the Inter-American Commission

80. *Joseph*, *supra* note 4, at ¶ 138.

81. *Id.* ¶ 133.

82. *Id.* ¶ 136 (referring to the majority opinion in *Matthew v. The State*, [2004] UKPC 33, [2005] 1 A.C. 433 (appeal taken from Trin. & Tobago)).

83. *Id.* ¶ 15; *see also id.*, at ¶ 33 (Nelson, J.) (stating that the question of whether commutation of the death sentence was proper under *Pratt* was academic in light of the state's concession of its application).

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in order to be heard by the Inter-American Court. These actions of the BPC after the JCPC decision on the constitutionality of the MDP resulted in the Boyce and Joseph case being appealed to the CCJ. The three issues before the CCJ were (1) whether the BPC's decision subject to judicial review; (2) whether the BPC's failure to await the outcome of the petition to the Inter-American Commission violated Joseph's and Boyce's right to protection under the law and (3) whether the Barbados Constitution allowed the Court of Appeals to commute a death sentence and if so whether the factors considered were appropriate.⁸⁴

In 2002, Barbados had amended its constitution to allow the BPC, among other things, (1) to set deadlines for appeals to or consultations with institutions or persons outside the Barbados appellate process and (2) to exercise its functions before the completion of those appeals or consultations.⁸⁵ As noted by the CCJ, "these amendments were prompted by dissatisfaction on the part of the people of Barbados with certain decisions of the JCPC and the resolve of the Barbados Parliament to restrict at least, if not negate, the effects of these decisions."⁸⁶ Applying these amendments, the BPC met and advised against the commutation of the death sentence before the Inter-American Commission had acted on the Boyce-Joseph petition.⁸⁷

In reviewing the acts of the BPC, both the High Court and the Court of Appeals in Barbados found that the BPC could not meet before the conclusion of the Commission's proceedings. Moreover, the Court of Appeals also indicated that courts could set aside the BPC decisions or have declared them null.⁸⁸

The decision by the Barbados Court of Appeals raised the question of whether the BPC decisions about the exercise the prerogative of mercy were subject to judicial review. Section 77(4) of the Barbados Constitution, known as the "ouster clause", provides that: "[t]he question whether the Privy Council has validly performed any function vested in it by this Constitution shall not be inquired into by any court."⁸⁹ In addition, earlier JCPC cases indicated that since "mercy was not the subject of legal rights . . . the

84. *Id.* ¶ 11.

85. BARB. CONST. § 78 (6).

86. *Joseph, supra* note 4, at ¶ 23.

87. The CCJ also noted that Boyce and Joseph "were convicted and sentenced before the amendments came into force but it was submitted in writing on their behalf that the new sub-sections applied to them." *Id.*

88. *Id.* ¶ 9.

89. BARB. CONST. § 77 (4).

prerogative of mercy was therefore not subject to review by the courts.”⁹⁰ President de la Bastide and Justice Saunders noted that shielding the exercise of the prerogative of mercy from judicial review runs contrary to “the modern approach to human rights with its emphasis on procedural fairness.”⁹¹ In addition, they observed that more recent JCPC decisions have found that “the processes involved in the exercise of mercy were not beyond review by the courts.”⁹² The Justices indicated their approval of this view by explaining:

We agree with those who regard the power to confirm or commute a death sentence, particularly a mandatory one, as far too important to permit those in whom it is vested freedom to exercise that power without any possibility of judicial review even if they commit breaches of basic rules of procedural fairness.⁹³

In addition, the ouster clause, in Section 77(4), did not preclude judicial review of BPC actions. President de la Bastide and Justice Saunders concluded that “the presence of such ouster clauses [will not deter courts] from inquiring into whether a body has performed its functions in contravention of fundamental rights guaranteed by the Constitution, and in particular the right to procedural fairness.” Thus, judicial review is appropriate when the procedures of the BPC affect procedural fairness and could result in the “breach of the respondents’ right to the protection of the law, one of the fundamental human rights.”⁹⁴

The next issue, whether the BPC was required to await the outcome of the petition to the Commission, ultimately led the

90. *Joseph, supra* note 4, at ¶ 30 (citing *de Freitas v. Benny*, (1976) AC 239; (1975) 27 WIR 318).

91. *Id.* ¶ 30. The Justices added: “In light of these developments, the exercise of the prerogative of mercy has fallen under greater scrutiny, especially in those states whose Constitutions permit, or specifically sanction, retention of the mandatory death penalty for the crime of murder. The occasion on which the prerogative of mercy is exercised is the final, and in mandatory death penalty regimes, the only, opportunity a convicted murderer has to point to the particular circumstances of his case and to argue by reference to them that he should not be executed. Whether he is or is not ultimately put to death by the State depends not just on the substantive exercise of the prerogative of mercy but also on the procedures governing and leading up to its exercise. The quality and nature of the advice given to the Governor-General bear a direct relationship to the quality and nature of the process followed by the BPC in coming to its decision.” *Id. at* ¶ 31.

92. *Id.* ¶ 36 (referencing *Lewis v. Attorney General of Jamaica*, [2001] 2 A.C. 50 (P.C.) (appeal taken from Jam.)).

93. *Id.* ¶ 39.

94. *Id.* ¶ 41.

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court “to examine the judgments of the JCPC that specifically address the position of a condemned man seeking to take advantage of provisions in a ratified but unincorporated human rights treaty.”⁹⁵ To address this issue, the CCJ identified the legitimate expectation doctrine as a means to establish the legal impact of unincorporated treaty obligations.⁹⁶

After reviewing a number of cases concerning the effect of unincorporated treaties on domestic law, the CCJ found that it was the government’s statements and actions that created a legitimate expectation that the BPC would await the outcome the Inter-American Court proceedings. The court opined that “the facts and circumstances that could have given rise to the legitimate expectation” included “[1] the fact that Barbados had ratified the ACHR, [2] positive statements . . . made by representatives of the Executive authority . . . to abide by that treaty . . . [and] [3] the practice of the Barbados Government to give an opportunity to condemned men to have their petitions to the international human rights body processed before proceeding to execution.”⁹⁷ The court stated that accordingly, “[i]n all these circumstances we would hold that the respondents had a legitimate expectation that the State would not execute them without first allowing them a reasonable time within which to complete the proceedings they had initiated under the ACHR by petition to the Commission.”⁹⁸

Justices de la Bastide and Saunders likened the denial of a legitimate expectation to an abuse of discretion or a lack of fairness. Along these lines, the Justices created a balancing test to determine whether or not a legitimate expectation has arisen. In this test, “[t]he court must weigh the competing interests of the individual . . . and that of the public authority . . . [and] must make an assessment of how to strike the balance or be prepared to review the fairness of any such assessment . . . previously [made] by the public authority.”⁹⁹ In applying this balancing test to the facts in the Boyce case, the court explained,

In the case before us, there is on the one hand the legitimate expectation of the condemned men that they will be permitted a reasonable time to pursue their petitions with

95. *Id.* ¶ 44.

96. In construing the concept of “legitimate expectation,” the CCJ referred to *Minister of State for Immigration and Ethnic Affairs v. Teoh*, [1995] 183 C.L.R. 273 (Austl.).

97. *Joseph*, *supra* note 4, at ¶ 118.

98. *Id.*

99. *Id.* ¶ 124.

the Commission On the other hand, there is whatever the State may advance as an overriding interest in refusing to await completion of the international process before carrying out the death sentence. . . . [A]part from the constraints of the Pratt time-limit, the State of Barbados claims no overriding interest in putting the condemned men to death without allowing their legitimate expectation to be fulfilled.¹⁰⁰

The Justices also noted the respondents' legitimate expectation that the procedure "allowed a reasonable time to pursue their petitions and receive a favorable report from the international body" but did not include an expectation that "the BPC [would] abide by the recommendations in the report."¹⁰¹ Significantly, the CCJ limited the legitimate expectation approach as a means of invoking unincorporated treaty rights. The Justices stated that "the doctrine of legitimate expectation in this case is rooted in a number of considerations" including "the desirability of giving the condemned man every opportunity to secure the commutation of his sentence, the direct access which the treaty affords him to the international law process and the disproportion between giving effect to the State's interest in avoiding delay . . . and the finality of an execution."¹⁰²

CONCLUSION

As shown in the Boyce-Joseph Cases, the MDP in Barbados is constitutional, but subject to significant domestic and international safeguards. While the Barbadian MDP is preserved by the savings law provision in Section 26 of the Barbados Constitution, the implementation this sentence invokes a number of post-sentencing protections. Thus both the JCPC and CCJ have shown that international obligations may be considered in the meticulous judicial mechanics of the MDP. These obligations constrain the actions of the Barbados Privy Council and serve to alleviate the nullification of fundamental rights under the savings clause provisions. As a result, the JCPC and now the CCJ have forged the time limitations on domestic appeals and upheld the right to appeal to international bodies in an effort to ensure procedural integrity of the MDP. The resulting precedents have resulted in a

100. *Id.* ¶ 125.

101. *Id.*

102. *Joseph, supra* note 4, at ¶ 131.

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de facto repeal of the MDP in Barbados¹⁰³ and other Commonwealth Caribbean countries through the diligent infusion of due process and human rights principles into post sentencing mandatory penalty death proceedings.

103. The Attorney General of Barbados, Adriel Brathwaite, has announced that Barbados would formally abolish its mandatory death penalty and noted that no killer had been executed in Barbados since 1984. David McFadden, *Barbados AG Says Mandatory Death Penalty to End*, ASSOCIATED PRESS, Mar. 25, 2014, available at http://start.new.toshiba.com/news/read/category/Latin%20America%20and%20Caribbean%20News/article/the_associated_press-Barbados_ag_says_mandatory_death_penalty_to_end-ap. As of January 2015, two bills to abolish the mandatory death penalty were before the House of Assembly—Constitution (Amendment) Bill, 2014, and the Offences Against the Person (Amendment) Bill, 2014.

